79-569

Supreme Court, U. S.
FILED
OCT 6 1979
RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No.

EDDIE LEE WEATHERSBY,
Petitioner,
v.
STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FOUR

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6/6/79

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FOUR

Petitioner EDDIE LEE WEATHERSBY respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, First Appellate District, Division Four.[1] The Judgment became final and was entered on August 1, 1979, following the issuance of an opinion on June 6, 1979.

OPINIONS BELOW

The unreported opinion of the Court of Appeal affirming petitioner's murder conviction was filed on June 6, 1979, and is reproduced as Appendix A hereto. The order of the California Supreme Court denying discre-

[1] The Court of Appeal of the State of California, First Appellate District, Division Four, is hereafter referred to as the "Court of Appeal."

tionary review was entered on August 1, 1979, and is reproduced as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3). The decision of the Court of Appeal became final on August 1, 1979, when the California Supreme Court denied discretionary review. Rules 25 and 28, California Rules of Court.

QUESTIONS PRESENTED

1. Did the exclusion of sixteen black persons from petitioner's petit jury by the prosecutor's exercise of peremptory challenges, resulting in petitioner's trial and conviction by an all-white jury, violate, or make out a *prima facie* case of violation of, petitioner's Sixth Amendment right to an impartial jury comprising a fair cross-section of the community?

2. Did the exclusion of sixteen black persons from petitioner's petit jury by the prosecutor's exercise of peremptory challenges, resulting in petitioner's trial and conviction by an all-white jury, violate, or make out a *prima facie* case of violation of, petitioner's Fourteenth Amendment right to equal protection of the laws (*i.e.*, to be free from invidious racial discrimination), and should *Swain* v. *Alabama,* 380 U.S. 202 (1965), be overruled?[2]

[2] Similar issues involving the jury selection system of the State of Georgia are pending in *Willis* v. *Georgia,* No. 79-5143, pet. for cert. docketed July 27, 1979, a death penalty case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides in part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."

The Fourteenth Amendment provides in part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Penal Code section 1069 provides in part:

"A peremptory challenge can be taken by either party, and may be oral. It is an objection to a juror for which no reason need be given, but upon which the Court must exclude him."[3]

STATEMENT OF THE CASE

Petitioner was one of several co-defendants charged and convicted of the murder of Lester Nelson at the Santa Rita Rehabilitation Facility.[4] The prosecution's theory was that the killing of Nelson was in revenge of Nelson's heroin-overdose murder of a woman named Nira Bostic, a friend of petitioner and co-defendant Tucker (the Coroner concluded that Ms. Bostic's death

[3] *See generally* California Penal Code sections 1067–1070.5.

[4] Santa Rita is the county jail of Alameda County, California, the county in which the City of Oakland is situated.

was accidental); that the killing had been arranged by one Pepper Terry who had fathered a child by Ms. Bostic; that petitioner and co-defendant Tucker stabbed and thereby injured Nelson in the shower-room of Compound 3-C at Santa Rita; that the actual killing blows were struck by co-defendant Wyatt who repeatedly bludgeoned Nelson's head with a mop-wringer (Wyatt was acquitted); and that co-defendant Browning—as godfather of the Black Guerrilla Family ("BGF"), a prison gang which allegedly terrorizes inmates in penal institutions—ordered, master-minded, and oversaw the killing (Browning's murder conviction was subsequently reversed on appeal, *see People* v. *Browning,* 79 Cal.App.3d 320 (1978)). The prosecution's evidence was weak and suspect; virtually all prosecution "eyewitnesses" received promises of leniency or dismissals of numerous serious charges pending against them in exchange for their testimony.[5]

[5] For example, the two most damning prosecution "eyewitnesses" were Harry Guidry and William Hackney. When Guidry testified before the grand jury in this case, he was permitted to enter a plea bargain with the district attorney in another case pursuant to which the following charges were dismissed: sale of barbiturates, possession of barbiturates for sale, four counts of forcible rape, robbery, sodomy, two counts of false imprisonment, two counts of assault with intent to commit rape, attempted murder, two counts of forced oral copulation, kidnapping for purposes of robbery with the intentional infliction of great bodily injury (punishable by life imprisonment in California), and arming clauses charged with respect to the first nine counts in the information. In addition, allegations of prior felony convictions were dismissed pursuant to the bargain and the first-degree robbery of which Guidry was convicted was reduced to second-degree; Guidry was also promised that he would be permitted to serve his time out of state. With respect to other benefits received by Guidry in exchange for his testimony, *see generally* Reporter's Transcript 1470–1473.

Considerable evidence was presented at trial that prosecution witness Hackney participated in and in fact oversaw the Nelson killing. Hackney was granted complete transactional immunity from prosecution for the Nelson killing in exchange for his testimony. In addition, the district attorney had promised to dismiss existing charges pending against Hackney, including forcible rape, forced oral copulation, receiving stolen property, and possession of a weapon by an ex-felon.

The remaining prosecution "eyewitnesses" were also promised benefits by the district attorney in exchange for their testimony; they included Jonathan Pugh, Albert Bell, John Anjell, and Pepper Terry.

The case was a close one. The jury deliberated more than 24 hours over a period of four days before returning petitioner's guilty verdict. On the second day of deliberations, one juror inquired of the trial judge why there was no form for a hung jury, and on the fourth day, just 29 minutes after the verdict against petitioner was returned, the trial judge gave the *Allen* instruction for deadlocked juries which formed the basis of the reversal of co-defendant Browning's subsequent conviction. *People* v. *Browning, supra,* 79 Cal.App.3d 320 (1978).

Petitioner, a black man, contends that he was convicted not on the basis of the prosecution's evidence, all of which was of a nature and quality inherently weak and suspect, but upon an appeal to the racial fears and prejudices of the all-white jury from which sixteen black persons were systematically excluded by the prosecutor's exercise of peremptory challenges. During jury selection, 134 prospective jurors were called into the jury box. Of those, nineteen were black. Three black persons were excused for cause, and the remaining sixteen were peremptorily challenged by prosecutor Anderson. The prosecution exercised a total of 34 peremptory challenges, and on no occasion when a black person was seated in the jury box did the prosecution pass its challenge.

Petitioner repeatedly objected to the prosecutor's systematic exclusion of black persons from the jury, but each such objection was denied by the trial court. On the third occasion when the objection was made, defense counsel noted that prosecutor Anderson had winked at

the defendants several times after peremptorily challenging black persons; the trial court admonished Anderson to desist from that conduct. After the fourth such objection was made, Anderson attempted to justify his purposeful exclusion of blacks on the basis that the race of those jurors would somehow make them more susceptible to intimidation, at which point petitioner's counsel observed that the prosecutor's statement was a clear admission of systematic exclusion based on group bias. Anderson's purported justification is belied by the fact that he subsequently permitted a black man to serve as third alternate juror. That alternate juror never participated in the deliberations resulting in petitioner's conviction.

At trial, the jury was inflamed by references to the Black Guerrilla Family ("BGF"); a 1974 San Quentin murder allegedly involving the BGF and co-defendant Browning; Donald DeFreeze (or "Cinque") and by implication the Symbionese Liberation Army (the captors of Patricia Hearst and supposed killers of Oakland School Superintendent Marcus Foster); George Jackson and by implication the San Quentin Six and the Marin County Courthouse Shootout; the Zebra Killers of San Francisco (the authors of a number of random street murders in that city); the Black Muslim Religious Sect; and the Black Panther Party. If this evidence was admissible at all, it was admissible solely against co-defendant Browning.[6] No connection between petitioner and any

[6] Petitioner also argued below that the trial court erroneously denied his numerous requests for a separate trial.

of these persons, organizations, or events was ever shown by the prosecution, and none exists. Nevertheless, the spectre of racial and terrorist violence, prison gang executions, and several of the most notorious persons and events to have entered to public consciousness in the last decade hovered over the trial, undoubtedly contributing to the guilty verdict returned against petitioner.

Petitioner argued extensively below that the prosecutor's purposeful exclusion of black people from his petit jury violated both his state and federal constitutional rights, but the Court of Appeal refused to address his properly raised federal claims.[7] In its opinion filed June 6, 1979, the court merely inquired whether petitioner was entitled to state constitutional relief under *People* v. *Wheeler*, 22 Cal. 3d 258 (1978), and, concluding that *Wheeler* was not to be retroactively applied to petitioner, denied all relief respecting petitioner's peremptory challenge arguments (*see* Appendix A). The California Supreme Court denied discretionary review on August 1, 1979, thereby rendering the decision of the Court of Appeal final (*see* Appendix B).

This petition follows.

[7] In his petition for rehearing in the Court of Appeal and his petition for hearing before the California Supreme Court, petitioner also argued that the court's failure to address his properly-raised federal claims denied him his state and federal due process rights to meaningful appellate review. Both petitions were denied.

REASONS FOR ALLOWANCE OF THE WRIT

I. The Prosecutor's Purposeful and Systematic Exclusion of Sixteen Black People from Petitioner's Petit Jury by the Exercise of Peremptory Challenges Denied Petitioner's Sixth Amendment Right to a Jury Comprising a Fair Cross-Section of the Community. No Court, Including This One, Has Yet Measured the Justification for the Unfettered Exercise of Prosecution Peremptory Challenges Against a Defendant's Sixth Amendment Rights. The Time Is Ripe for this Court to Do So.

As *Taylor* v. *Louisiana,* 419 U.S. 522 (1974), made plain, the requirement that a jury be chosen from a fair cross-section of the community is a fundamental component of a criminal defendant's Sixth Amendment right to jury trial, made binding on the States by the Fourteenth Amendment (*Duncan* v. *Lousiana,* 391 U.S. 145 (1968)).

In *Taylor,* the Court held the Sixth and Fourteenth Amendments were violated by the operation of Louisiana constitutional and statutory provisions exempting women from jury service unless they volunteered. Mr. Justice White, speaking for the seven-member majority, carefully reviewed the Court's prior decisions and concluded, 419 U.S. at 528:

> "The unmistakable import of this Court's opinions, at least since 1940, *Smith* v. *Texas, supra* [311 U.S. 128 (1940)], and not repudiated by intervening decisions, is that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial."

While a defendant is not entitled to a jury precisely mirroring the community, *id.* at 538, the concept of "a diffused impartiality," *id.* at 530–531, is essential to the

Sixth Amendment's guarantee. A homogeneous jury not reasonably representative of the community from which it is selected is a jury potentially susceptible to subtle appeals to race or other prejudice—one form of prosecutorial abuse the institution of the jury exists to guard against. *Duncan* v. *Louisiana, supra,* 391 U.S. at 155–156. Moreover, its lack of access to the experience and values of the excluded class, a human perspective which may be crucial to a just result in a given case, leaves it subject to unwitting errors. *Peters* v. *Kiff,* 407 U.S. 493, 503–504 (1972). Beyond these considerations, the jury is the most democratic of our institutions. Its power and legitimacy are derived from the commonly-held notion that its verdict is the verdict of the community. *See generally Taylor, supra,* 419 U.S. at 530; Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Panels (1977).

It follows that the constitutional guarantee of trial by an impartial jury contemplates trial by a jury comprised of individuals who are both (1) unbiased and (2) sufficiently varied to assure fair representation of the community. The first element, lack of bias, does not mean bland indifference, for jurors are human beings. What it must mean is a willingness or capacity to be persuaded and influenced by the life experiences of others. *See Murphy* v. *Florida,* 421 U.S. 794, 800 (1974) (opinion of Marshall, J.); *Irvin* v. *Dowd,* 366 U.S. 717, 723 (1961); Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 Stan. L.Rev. 545, 551–52 (1975). And the second element, representativeness, is that which assures a broad

diffusion of viewpoints and hence a verdict reflecting the experience and values of the community. Without both components, a jury cannot be deemed "impartial" in the constitutional sense.

Professor Hans Zeisel of the University of Chicago Law School, co-author of Kalven and Zeisel, The American Jury (1966), summed it up as follows:

> "The Court in *Williams* [v. *Florida,* 399 U.S. 78 (1970)] quite correctly emphasized community representation as an essential ingredient of our juries. By now we know that in the crucial twenty percent of all jury trials in which the jury's verdict differs from what the presiding judge would have done, it is precisely the injection of the community's sense of justice which makes the jury verdict what it is." Zeisel, *Six Man Juries, Majority Verdicts—What Difference Do They Make?* 5 Occasional Papers from the University of Chicago Law School (1973), at 3.

True, the facial language of *Taylor* leaves open the question whether the petit jury itself, and not merely the panel from which it is selected, must fairly represent the community. However, the reasoning of *Taylor* and the cases preceding it leaves little doubt that the requirement must apply to the deliberative body, not just the sub-population from which it is selected. The fair cross-section requirement is designed to preserve the impartiality and hence the validity of the jury's verdict. Where, as here, the representative nature of the panel is undermined in the final stage of the selection process (*i.e.,* the challenge stage), adherence to the requirement in earlier stages is an empty gesture. All the evils

the requirement is intended to dispel are reasserted in the final stage. Notably, this Court's recent decision in *Ballew* v. *Georgia,* 435 U.S. 223 (1978), in which the Court held the use of five-person juries in criminal cases violates the fair cross-section requirement, suggests that the requirement applies to the petit jury itself, not merely the panel from which it is selected. Language to the contrary in *Duren* v. *Missouri,* ___ U.S. ___[58 L.Ed.2d 579] (1979), cannot be deemed controlling because *Duren* merely involved a challenge to the composition of Missouri jury venires.[8]

As noted by the California Supreme Court in its landmark decision in *People* v. *Wheeler,* 22 Cal.3d 258, 277–278 (1978):

> "[A] party is constitutionally entitled to a petit jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits. Obviously he cannot avoid the effect of that process: the master list must be reduced to a manageable venire, and that venire must in turn be reduced to a 12-person jury. The best the law can do to accomplish those steps with the least risk to the representative nature of the jury pool is to take them by random means, i.e., by drawing lots. We recognize that in a predictable percentage of cases the result will be a wholly unbalanced jury, usually composed exclusively of members of the majority group. This is inevitable, the price we must pay for juries of a workable size. It is no less inevitable, however, that in all other instances—as in the case at bar—the represent-

[8] The Sixth Amendment guarantees an impartial jury, not merely an impartial panel or venire.

ative nature of the pool or venire will be reflected at least in some degree in the 12 persons called at random to the jury box. It is that degree of representativeness—whatever it may prove to be—that we can and must preserve as essential to trial by an impartial jury. Certainly the prospective jurors are then subject to challenges for cause and peremptory challenges on grounds of specific bias; but for the reasons stated above we cannot countenance the decimation of the surviving jurors by peremptory challenges on the ground of group bias alone."

The Sixth Amendment's impartial jury guarantee is violated whenever jurors are systematically excluded solely on the basis of their group associations rather than their situation-specific biases. *See, e.g.,* Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries,* 86 Yale L.J. 1715 (1977). A contrary rule leaves a fundamental component of the Sixth Amendment's guarantee subject to prosecutorial whim and ensures an impartial jury only when the prosecutor permits it. Beyond that, a contrary rule undercuts the very purpose of the jury:

> "to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or overconditioned or biased response of a judge." *Taylor, supra,* 419 U.S. at 530.

In *Wheeler, supra,* the California Supreme Court held that the exclusion of blacks from jury service by peremptory challenge based on group bias is a violation of the impartial jury requirement of article I, section 16 of the California Constitution. *Id.,* at 276–277. The court then fashioned a relatively non-intrusive prophylactic remedy designed to ensure, on a case-by-case basis, that such

violations not take place. *Id.,* at 278–282.[9] In reaching its conclusion, the court relied very heavily on this Court's Sixth Amendment "fair cross-section" cases. *Id.,* at 266–270. The factual circumstances in this case make out a far more egregious instance of improper exclusion than in *Wheeler* or any of the cases reversed under its aegis,[10] but petitioner was denied *Wheeler* relief because *Wheeler* was not made retroactive. 22 Cal.3d at 283 n. 31.[11]

Since this Court's decision in *Swain* v. *Alabama,* 380 U.S. 202 (1965), a criminal prosecutor's exercise of peremptory challenges has uniformly been held immune from federal constitutional attack in the absence of proof of systematic class exclusion by peremptory challenge over a period of time. *Id.,* at 222–228. In *Swain,* however, the claim was one of invidious racial discrimination under the Fourteenth Amendment, not the denial of a defendant's Sixth Amendment right to an impartial jury drawn from and comprising a fair cross-section of the community. *Id.,* at 203–205.[12] Accordingly,

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[9] *Wheeler* procedures were followed in *Commonwealth* v. *Soares,* ___ Mass. ___, 387 N.E.2d 499 (Mar. 8, 1979). *See also State* v. *Brown,* ___ La. ___, 371 So. 2d 751 (May 21, 1979).

[10] *See also People* v. *Johnson,* 22 Cal. 3d 296 (1978); *People* v. *Allen,* 23 Cal.3d 286 (1979).

[11] The state supreme court nevertheless held that *Wheeler* error is "prejudicial per se" because it goes to the very integrity of the fact-finding process. 22 Cal.3d at 283.

[12] Not only did the Court characterize Swain's claim as resting on the constitutional principle enunciated in *Strauder* v. *West Virginia,* 100 U.S. 303 (1880), *see* 380 U.S. at 202, but *Swain* is notably absent from the exhaustive review of the "fair cross-section" cases contained in the majority opinion in *Taylor, supra,* 419 U.S. at 526–531. *See also* Note, *Use of Peremptory Challenges to Exclude Negroes from Trial Jury,* 79 Harv. L.Rev. 135, 136 n. 6 (1965).

It is also clear that no Sixth Amendment claim was addressed in *Swain* because the Sixth Amendment right to jury trial was not held binding in the States until *Duncan* v. *Louisiana, supra,* 391 U.S. at 149, a case decided three years after *Swain.*

no court, including this one, has yet measured the justification for the unfettered exercise of prosecution peremptory challenges against a defendant's Sixth Amendment rights. *Cf. Wheeler, supra,* 22 Cal. 3d at 284.

Indeed, the rule established by *Swain* is only comprehended with that distinction in mind, for *Swain* is predicated on the view that invidious race discrimination is a basis for exercising peremptory challenges unrelated to the outcome of the case. The *Swain* majority relied on the presumption that, in a particular case, the state is exercising its peremptories based on the "real or imagined partiality" of the challenged jurors, *id.* at 220, and not an invidious racial animus. It held that the prosecutor's exclusion of all blacks in a given case is not sufficiently probative of purposeful discrimination to overcome the presumption and thus the prosecutor's reasons for so exercising his challenges—presumptively outcome-related—are insulated from Fourteenth Amendment inquiry. *Id.,* at 222.[13] And having thus disposed of the discrimination claim based on the absence of evidence of systematic exclusion of blacks over a period of time, this Court never considered whether the defendant's Sixth Amendment rights may have been violated.

[13] The *Swain* burden of proof, inapplicable to a Sixth Amendment claim, has been the subject of considerable criticism, much of it based on the near impossibility of a defendant's sustaining that burden. *See, e.g.,* Kuhn, *Jury Discrimination: The Next Phase,* 41 So.Cal. L.Rev. 235, 253, 266 n. 132, 287 (1968); Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process,* 18 St. Louis U.L.J. 662, 669–73 (1974).

The *Swain* burden of proof has little applicability to proof of a Sixth Amendment claim. While evidence of the exclusion of black persons from juries over a period of time may bolster a claim of purposeful discrimination because it tends to show the prosecutor's long-standing antagonism toward the excluded class, the absence of such evidence has little probative value in establishing whether a given defendant has been denied an impartial and representative jury.[14] The appropriate inquiry here is not whether the prosecutor has evinced discriminatory intent over a period of time but whether the practice in this case deprived petitioner of a trial by an impartial jury comprising a fair cross-section of the community. To conclude otherwise would endorse the denial of a defendant's Sixth Amendment rights so long as a similar denial is not accomplished in every case. It would also grant the prosecutor a license for abuse limited only by the requirement that he circumspectly choose the cases in which he exercises it.

A prosecutor's exclusion of all black persons from a petit jury solely because they are members of an identifiable racial group frustrates the primary purpose which the fair cross-section rule is designed to facilitate. Such a practice seeks to deny the jury a unique perspective,

[14] Language to the contrary in *Duren* v. *Missouri, supra,* may be distinguished on the basis that *Duren* involved a challenge to the Missouri method of establishing venires. While a state's method of establishing venires is by definition systematic (*i.e.,* it involves more than one case), a given prosecutor's pattern of exercising challenges and whether that pattern contravenes the defendant's Sixth Amendment rights can only realistically be judged on a case-by-case basis.

the inclusion of which may be crucial to ensure both that the jury is impartial and that its verdict approximates that of the community.

As the California Supreme Court observed in *Wheeler:*

> "[W]hen a party presumes that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds—we may call this 'group bias'—and peremptorily strikes all such persons for that reason alone, he not only upsets the demographic balance of the venire but frustrates the primary purpose of the representative cross-section requirement. That purpose, as we have seen, is to achieve an overall impartiality by allowing the interaction of the diverse beliefs and values the jurors bring from their group experiences. Manifestly if jurors are struck simply because they may hold those very beliefs, such interaction becomes impossible and the jury will be dominated by the conscious or unconscious prejudices of the majority. Seen in this light, the presumed group bias that triggered the peremptory challenges against its members is indistinguishable from the group perspective we seek to encourage by the cross-section rule." *Id.,* at 176 (footnote omitted).

In sum, petitioner's right to a trial by an impartial jury comprising a fair cross-section of the community is well established under the Sixth Amendment. The representativeness requirement applies to the jury itself, not just the panel from which it is selected, and hence that requirement was violated in this case by the prosecutor's unexplained use of his peremptory challenges to exclude all sixteen black persons not excused for cause

from petitioner's jury. Finally, the decision in *Swain* v. *Alabama,* which did not address this claim, cannot be deemed controlling.

This question is one of great importance. Whether a prosecutor's purposeful exclusion of a cognizable class of persons from jury service based on group bias is a common or relatively rare practice, a remedy should exist to protect every defendant's Sixth Amendment rights. Such a remedy may be fashioned without doing substantial violence to existing jury selection systems. *See Wheeler, supra,* 22 Cal.3d at 278–282. The practice of purposeful class exclusion by peremptory challenge strikes at the very integrity of the jury's verdict and should be disapproved by this Court at the earliest possible time.

II. The Prosecutor's Purposeful and Systematic Exclusion of Sixteen Black People from Petitioner's Petit Jury by the Exercise of Peremptory Challenges Denied Petitioner the Equal Protection of the Laws. The Time Is Ripe for Consideration of Whether *Swain* v. *Alabama* Should Be Overruled.

Turning to petitioner's equal protection claim, petitioner maintains that the *Swain* burden-of-proof has been significantly eroded by subsequent decisions of this Court. Two such cases, *Whitus* v. *Georgia,* 385 U.S. 545 (1967), and *Alexander* v. *Louisiana,* 405 U.S. 625 (1972), vividly indicate this erosion. Petitioner also maintains that this Court has increasingly countenanced the use of statistics in a single case to demonstrate a low probability that mere chance alone—rather than unconstitutionally discriminatory bias—was responsible for the exclusion of black persons from jury service or employment opportunities.

In *Whitus*, for example, this Court reaffirmed the constitutional principle that "[f]or over fourscore years it has been . . . the law of this Court as applied to the States through the Equal Protection Clause of the Fourteenth Amendment, that a conviction cannot stand if it is based on an indictment of a grand jury *or the verdict of a petit jury from which Negroes were excluded by reason of their race.*" *Whitus, supra,* 385 U.S. at 549–550 (emphasis supplied). Significantly, in reaffirming this principle *Whitus* did not explicitly carve out an exception for those instances where such exclusion results from the use of peremptory challenges. In fact, the Court held that petitioner had made a *prima facie* showing of racial discrimination based in part on data that, from a venire of 90 persons of which at least seven were black, "no Negro was accepted on the petit jury." *Id.* at 550. Thus, the Court in *Whitus* specifically held that the actual petit jury which tries a criminal defendant must be chosen in a manner which does not exclude blacks because of their race. To the extent that *Swain* condoned any racially discriminatory use of peremptory challenges to choose a petit jury, it must be considered to have been overruled at least implicitly by the subsequent decision in *Whitus.*

In *Alexander* v. *Louisiana, supra,* this Court held that petitioner had proved that the makeup of the grand jury which had indicted him had violated the Equal Protection Clause. The proof for this claim was statistical data. Petitioner had argued that there had been "a consistent

process of progressive and disproportionate reduction of the number of Negroes eligible to serve on the grand jury *at each stage* of the selection process until ultimately an all-white jury was selected to indict." *Alexander* v. *Louisiana, supra,* 405 U.S. at 629 (emphasis added). The Court in *Alexander* agreed that the facts presented constituted a *prima facie* case of discrimination. The burden of demonstrating a lack of racial bias in the process of selecting the grand jury then shifted to the state, which failed to carry that burden. *Id.* at 632.

Since the use of peremptory challenges is the final stage of selecting a jury as well as that stage most readily subject to discriminatory abuse, *Alexander*—like *Whitus*—must be read as having qualified *Swain.* It should be viewed as having disapproved *sub silentio* any indication in *Swain* that the racially discriminatory use of peremptory challenges in a specific case cannot be proved in any way other than by showing the systematic exclusion of blacks over a period of time.

The erosion of *Swain's* holding that the discriminatory use of peremptory challenges cannot be proved from statistical data in an individual case is further demonstrated by the Court's increasing recognition of the probative force of statistical evidence in establishing a *prima facie* case of racial discrimination. This is demonstrated by many decisions subsequent to *Swain* in the fields of jury selection (*see, e.g., Rose* v. *Mitchell,* ____ U.S. ____ [47 U.S.L.W. 4948] (July 2, 1979); *Castaneda* v. *Partida,* 430 U.S. 482, 487–90 (1977); *Turner* v. *Fouche,* 396 U.S. 346, 349–52 (1970); *Carter* v. *Jury Comm'n of*

Greene County, 396 U.S. 320, 327–28 (1970); *Simms* v. *Georgia*, 389 U.S. 404, 407 (1967); *Jones* v. *Georgia*, 389 U.S. 23, 25 (1967)) and employment discrimination (*see, e.g., Int'l Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 336–339 (1977); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975); *Mayor of Philadelphia* v. *Educational Equality League*, 415 U.S. 605, 620 (1973); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 805 (1973)). These cases indicate that statistical analysis of the probability of racial discrimination in a *single case* is now well accepted by the Court as a factor in proving such discrimination. Hence, the requirement of *Swain* that a criminal defendant must show the systematic, historically discriminatory use of peremptory challenges by a prosecutor before he can obtain a new trial free from such error appears outdated and should be overruled.

In this case, the probability that all sixteen black persons peremptorily challenged by the prosecution were excluded on the basis of mere chance is very low indeed. Conversely, the probability that the exclusion of all blacks was caused by an invidiously discriminatory animus is very high. If such racial animus infected the prosecutor's use of his peremptory challenges, the selection of petitioner's jury was unconstitutionally tainted and his judgment of conviction must be reversed.[15] At

[15] Because the prosecutor attempted to justify the exclusion of all blacks on a generalized and racially stereotypic basis (*see* Jury Selection Transcript 898), this case bears a marked similarity to *People* v. *Johnson*, 22 Cal.3d 296 (1978). Petitioner submits that such a prosecutorial admission obviates the necessity of a defendant's coming forth with any proof at all of an improper racial motive for the exclusion.

the minimum, these facts make out a *prima facie* case of purposeful discrimination, shifting the burden of proof to the prosecution.

The practice of the invidiously discriminatory exclusion of black people from jury service by the exercise of peremptory challenges is an affront to cherished constitutional principles articulated by this Court a century ago in *Strauder* v. *West Virginia*, *supra*, 100 U.S. 303 (1880). But for its decision in *Swain* v. *Alabama*, the Court has vigilantly protected those principles from *Strauder* to the present day, *see, e.g., Rose* v. *Mitchell*, *supra*, ___ U.S ___ [47 U.S.L.W. 4948] (July 2, 1979). The time is ripe for consideration of whether *Swain* v. *Alabama* should be explicitly overruled.

CONCLUSION

For the foregoing reasons, the writ should issue.

DATED: September 27, 1979

Respectfully submitted,

QUIN DENVIR, *California State Public Defender*

MARK FOGELMAN
Deputy State Public Defender

Attorneys for Petitioner

APPENDIX A

IN THE
COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Respondent,* vs. EDDIE LEE WEATHERSBY *Defendant and Appellant.*	1 Crim. 16999 (Sup. Ct. No. 62020)
PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Respondent,* vs. ALLEN RAY TUCKER, *Defendant and Appellant.*	1 Crim. 17113 (Sup. Ct. No. 62020)
PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. MARK L. EATON, in his official capacity as a magistrate, *Defendant,* EDDIE LEE WEATHERSBY and ALLEN RAY TUCKER, *Real Parties in Interest and Appellants.*	1 Civil 42353 (Sup. Ct. No. 480245-7)

Eddie Lee Weathersby and Allen Ray Tucker appeal from judgments following a jury verdict finding them guilty of first degree murder (Pen. Code, § 187), and also appeal as real parties in interest from a judgment granting the People a peremptory writ of prohibition restraining a judge of the municipal court from taking any action in the case.

I

Lester Nelson was stabbed and bludgeoned to death by a group of inmates at the Alameda County jail at Santa Rita upon his return to the facilities after a court appearance. The evidence showed that the motive for the killing was revenge for Nelson's murder of Nira Bostic, who had once lived with inmate Gerald Terry.

On May 10, 1976, the district attorney filed a complaint in municipal court charging appellants, as well as Ricky Wyatt and Stephen Browning, with the murder of Lester Nelson. Two days later, the Grand Jury of Alameda County indicted these four individuals for the same murder.

After securing the indictment, the district attorney moved to dismiss the earlier complaint, but the magistrate denied the motion on the ground that defendants would thereby be deprived of a preliminary hearing.

The prosecutor then petitioned the superior court for a writ of prohibition seeking to restrain the municipal court judge from taking any further action on the complaint. That court issued the peremptory writ.

The case proceeded to trial against Browning, Wyatt,

Weathersby and Tucker, Tucker's motion for severance having been denied. After the first 12 jurors were selected, the defendants moved to dismiss the jury and for an order declaring a mistrial based upon the district attorney's systematic exclusion of blacks from the jury panel through the use of peremptory challenges. The motions were denied. On several occasions during the course of trial, appellants' respective counsel moved for severance and for mistrial, based upon allegedly prejudicial evidence regarding Browning's prior activities, especially in connection with the Black Guerilla [sic] Family.

The jury found appellants guilty of first degree murder. Later in the same day, the court gave the *"Allen"* instruction. Soon thereafter, the jury returned with a verdict of acquittal as to defendant Wyatt and second degree murder as to defendant Browning.

On April 3, 1978, this court granted defendant Browning's "Motion for Summary Reversal" based upon the giving of the *Allen* instruction. (*People* v. *Browning* (1978) 79 Cal.App.3d 320.) We are now confronted with the direct appeals of appellants Weathersby and Tucker emanating from the same action.

II

A. Is Reversal Required Because Of The Failure Of The Trial Court To Grant Appellants A Preliminary Hearing?

Both appellants argue that the superior court's peremptory writ of mandate, which allowed them to be prosecuted under an indictment without a preliminary examination, deprived them of their constitutional

rights under the Sixth and Fourteenth Amendments.

The California Supreme Court has recently decided the issue in *Hawkins* v. *Superior Court* (1978) 22 Cal.3d 584. It held that the denial of such fundamental rights as counsel, confrontation and a hearing before an impartial magistrate to defendants prosecuted solely under an indictment violated the equal protection clause of the California Constitution. The opinion stated: "Because of previous reliance by the bench and bar on the validity of current postindictment procedures, the rule announced herein shall apply only to the present case and to those indicted defendants who have not entered a plea at the time this opinion becomes final. [Citation.]" (*Id.*, at p. 594.)

Because appellants' pleas were entered long before the issuance of the *Hawkins* decision their contention must be governed by prior law on the subject, which consistently rejected constitutional attacks on the state's indictment procedure. (See *People* v. *Sirhan* (1972) 7 Cal.3d 710, 746–747 and cases cited therein; *People* v. *McGrath* (1976) 62 Cal.App.3d 82, 85.) Consequently, there was no error in failing to accord appellants a postindictment preliminary examination.

We do note that the magistrate below refused to dismiss the complaint against the defendants and was restrained from taking any further action thereon under a writ of prohibition issued by the superior court. It is also true that in *People* v. *Levins* (1978) 22 Cal.3d 620, the Supreme Court held that the superior court had no jurisdiction to compel a magistrate to dismiss a criminal

complaint under Penal Code section 1385, because that section authorizes dismissal only by trial courts and not by magistrates. (*Id.*, at p. 624; see *People* v. *Peters* (1978) 21 Cal.3d 749.) However, that holding does not affect the result herein: the writ issued by the superior court commands the magistrate "to permanently desist and refrain from taking any further action in [the case at bar]*except* to recalendar and dismiss the complaint. . . ." (Emphasis added.) Although, under *Levins*, the superior court was without jurisdiction to order the magistrate to dismiss the complaint, it did have the authority to restrain the magistrate from proceeding any further, thereby allowing the prosecution to proceed by indictment. (See *People* v. *Superior Court (Persons)* (1976) 56 Cal.App.3d 191, 193–194.) Inasmuch as appellants were tried and convicted under a valid accusatory pleading, the judgment may not be disturbed for failure to accord them a preliminary examination. (Cf. *People* v. *Combes* (1961) 56 Cal.2d 135, 145.)

B. Did The Prosecutor Improperly Use Peremptory Challenges To Systematically Exclude Blacks From The Jury?

Appellants also contend that the prosecutor used his peremptory challenges to exclude black persons from the jury, thereby denying appellants their rights to a jury trial and violating the due process and equal protection clauses.

Again, the California Supreme Court has recently issued a decision on the subject. In *People* v. *Wheeler* (1978) 22 Cal.3d 258, the court ruled that the use of

peremptory challenges to exclude jurors solely on the basis of group bias violated a defendant's right to trial by jury drawn from a representative cross-section of the community under article I, section 16 of the state Constitution. (*Id.*, at pp. 276–277.) Once again, however, the court recognized the practical problems of applying such a rule to pending cases and limited the retroactivity of its holding. The court said: "The rule we adopt herein applies to the defendants in the case at bar and . . . to any defendant now or hereafter under sentence of death. [Citation.] In all other cases the rule will be limited to *voir dire proceedings conducted after the present decision becomes final.*" (22 Cal.3d at p. 283, fn. 31, emphasis added.)

In his reply brief, counsel for appellant Weathersby argues that we should not follow this language, because it is inconsistent with the principles regarding retroactivity as stated in other Supreme Court cases. This argument must necessarily fail. As an intermediate appellate court, we are bound to follow the law as declared by the Supreme Court. (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455.)

C. Did The Trial Court Improperly Deny Appellants' Motions For Severance and Mistrial?

Both appellants also contend that the trial court should have granted their numerous requests to sever their trials from that of the other defendants. Their argument is premised primarily on the fact that assertedly prejudicial evidence was introduced regarding defendant Browning and especially his leadership role in the

Black Guerilla [sic] Family, which "probably" influenced the jury's verdict against them. As corollary contentions, Weathersby assigns reversible error to the admission of evidence relating Browning to the Black Guerilla [sic] Family and to the 1974 killing of one William Cross at San Quentin, while Tucker argues that such evidence, along with references to the Muslim religion and to Zebra killers, was irreparably prejudicial and should have resulted in the granting of defense motions for mistrial.

Under Penal Code section 1098, where two or more defendants are charged with the same offense, "they *must* be tried jointly" unless the court in its discretion orders a separate trial. (Emphasis added.) A joint trial is thus the rule and a separate trial the rare exception. (Witkin, Cal. Criminal Procedure (1963) Trial, § 291, p. 285.) A trial court has full discretion in determining a motion for severance: that discretion will not be disturbed by the reviewing court absent a clear showing of abuse. (*People* v. *Floyd* (1970) 1 Cal.3d 694, 720; *People* v. *Simms* (1970) 10 Cal.App.3d 299, 307.)

Similarly, a motion for mistrial is addressed to the discretion of the trial court and may properly be refused where the court is satisfied that no injustice has resulted or will result from the events of which the complaint ensues. (*People* v. *Slocum* (1975) 52 Cal.App.3d 867, 884; *People* v. *Ray* (1967) 252 Cal.App.2d 932, 962.)

There was no abuse of discretion in denying appellants' motions for severance and mistrial based upon testimony linking defendant Browning to prison gangs

or black terrorist groups. The victim in this case, Lester Nelson, was also black. It is not an abuse of discretion to refuse to grant a severance because damaging testimony against a codefendant would not be admissible against the moving defendant. (*People* v. *King* (1938) 30 Cal.App.2d 185, 206; *People* v. *Lamb* (1962) 204 Cal.App.2d 255, 264.) Furthermore, appellants do not dispute the fact that each time such references were made, the trial judge either ordered them stricken or carefully admonished the jury that such evidence was limited to Browning and was not to be considered as to the other defendants. Their argument that the admonishments were not enough is based on a view that the jurors could not possibly have obeyed the court's instructions. The law, however, is precisely to the contrary: in the absence of other evidence, it must be presumed that the jury followed the court's instructions. (*People* v. *Rosoto* (1962) 58 Cal.2d 304, 326.)

That the jury listened to and did follow the court's admonitions is also demonstrable from the record. The minutes of court proceedings show that the jury had no difficulty in rendering a unanimous guilty verdict against both appellants, but remained deadlocked on the issue of Browning's guilt. This refutes appellants' contention that they were convicted of "guilt by association" with Browning. Moreover, after being given the tainted *Allen* instruction, the jury arrived at a second degree murder verdict against Browning but *acquitted* defendant Wyatt. Again, this demonstrates that this jury had the ability and did consider the evidence against each defendant separately.

Finally, any error in denying appellants' motions or evidence connecting Browning with the Black Guerilla [sic] Family or other crimes was decidedly harmless. Appellants' participation in the Nelson murder was corroborated by the eyewitness accounts of no less than four witnesses. Given the overwhelming evidence of guilt, it cannot be said a more favorable verdict would have been reasonably probable in the absence of the alleged errors. (*People* v. *Watson* (1956) 46 Cal.2d 818, 836; Cal. Const., art. VI, § 13.)

D. Did The Trial Court Err In Admitting Into Evidence Nelson's Autopsy Photographs?

Appellant Tucker contends that the trial court's ruling which allowed into evidence five colored autopsy slides and photographs of Nelson's body, constituted an abuse of discretion under Evidence Code section 352.* The exhibits reveal numerous and gruesome injuries inflicted upon the corpse, including stab wounds, deep lacerations, disfigurements and fractures.

"When allegedly gruesome photographs are presented, the trial court in the exercise of its discretion must decide whether their probative value outweighs their possible prejudicial effect." (*People* v. *Arguello* (1967) 65 Cal.2d 768, 775.) Tucker claims that the photographs had no effect other than to inflame the passions of the

* This section provides, in relevant part: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

jury against the defendants. This is not true. The photographs were relevant to clarify the testimony of the autopsy surgeon and as circumstantial evidence of malice. (*People* v. *Arguello, supra,* 65 Cal.2d at p. 775; *People* v. *Brawley* (1969) 1 Cal.3d 277, 295.) Although the photographs may have been unpleasant to view, it cannot be said the court abused its discretion in admitting them. (*Id.*) In light of the eyewitness testimony of the murder of Nelson, the photographs of his body provided nothing more shocking to the jurors than what they had already been told.

Furthermore, as noted above, the evidence of appellants' guilt was so overwhelming that any error in admitting the photographs presents no cause for reversal. (See part C, *supra.*)

E. Was The Prosecutor Guilty Of Prejudicial Misconduct?

Appellant Weathersby contends that the judgment against him should be reversed because of misconduct by the prosecutor. At no time during any of the instances of asserted misconduct, did defense counsel make a proper objection or request the trial judge to admonish the jury to disregard the remarks. In the absence of such an assignment of error *and* a request for an admonition or curative instruction, prosecutorial misconduct may not be assigned as error on appeal, unless (a) the case is closely balanced, presenting grave doubt concerning defendant's guilt and the misconduct materially contributed to the verdict, or (b) the misconduct was so reprehensible that no admonition could have cured it.

(*People* v. *Lyons* (1958) 50 Cal.2d 245, 262; *People* v. *Meneley* (1972) 29 Cal.App.3d 41, 58–59; *People* v. *Heideman* (1976) 58 Cal.App.3d 321, 327.)

The first of these exceptions is inapplicable here. Weathersby's participation as one of the principal assailants was established without question by four eyewitnesses. Counsel's assertions that "this was a very close case" and that the evidence was "weak and suspect" are truly remarkable.

We also reject the proposition that any misconduct was reprehensible beyond redemption. Prosecutorial misconduct "implies a dishonest act or an attempt by an attorney to persuade the jury by the use of deceptive or reprehensible methods." (*People* v. *Beivelman* (1968) 70 Cal.2d 60, 75.)

Weathersby's citations of alleged misconduct are of a trivial or insignificant nature. He first claims that misconduct was demonstrated by the exclusion of black members from the jury by use of peremptory challenges. But in view of the fact that this practice was permissible under governing authority at the time, this can hardly form the basis for an assignment of misconduct. Weathersby complains that the prosecutor "needled" the defendants by "winking at them." The record shows that in the one instance the prosecutor did engage in this behavior, but only in response to defendant Browning's calling him a derogatory name. He was promptly instructed by the trial court to desist. Weathersby further complains about the prosecutor's referring to him by his nickname "Buzz." Yet the record is clear

that this was the name by which his fellow inmates knew him. He cites as misconduct the prosecutor's attempt to raise the spectre of prison gangs and terrorist groups in the jury's mind; however the record shows that most of this "inflammatory" material was first introduced by counsel for the defense. On one occasion, the prosecutor did make an improper reference to the Black Muslims as belonging to the same group as the "Zebra killers" in San Francisco. In the absence of a request for admonition, however, the trial judge's order striking the reference was sufficient to cure any prejudice. (Cf. *People* v. *Ney* (1965) 238 Cal.App.2d 785, 798.)

The other citations of misconduct contained in Weathersby's attack are not worthy of specific reply, since they either involve conduct which took place out of the presence of the jury, or pertain to instances of personal animosity between the prosecutor and Browning. Any resulting prejudice to Weathersby was therefore either negligible or nonexistent.

We conclude that the prosecutor did not commit prejudicial misconduct.

The judgments in *People* v. *Weathersby* and *People* v. *Tucker* are affirmed. The appeal from the judgment in *People* v. *Eaton* is dismissed as moot.

_____

Poche, J.

We Concur:

_____ _____

Caldecott, P.J. Christian, J.

Appendix B

Order Due
August 3, 1979

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL
1st District, Division 4, CR. No. 16999, 17113, 42353

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent
v.
EDDIE LEE WEATHERSBY,
Defendant and Appellant
(and related matters)

Petitions for hearing DENIED.

/S/ BIRD
Chief Justice